1 May 2019

PRESS SUMMARY

The Heathrow Third Runway Litigation [2019] EWHC (Admin) 1069 and 1070

DIVISIONAL COURTS: Lord Justice Hickinbottom and Mr Justice Holgate; Lord Justice Hickinbottom, Mr Justice Holgate and Mr Justice Marcus Smith

NOTE

This summary is provided to assist in understanding the court's decision. It does not form part of the reasons for the decision. The full judgments of the court are the only authoritative documents. They are published at www.judiciary.uk/judgments

OVERVIEW

There were five claims for judicial review challenging the Secretary of State for Transport's decision to designate the Airports National Policy Statement ("ANPS"). The ANPS sets out the Government's policy on the need for new airport capacity in the South East of England and its preferred location, namely a new runway at Heathrow to the North West of the current two runways ("the NWR Scheme").

In four claims, the claimants comprised the London Borough of Hillingdon (in which Heathrow is situated) and four adjacent boroughs, the Mayor of London, several non-Government organisations dedicated to environmental causes (notably Greenpeace, Friends of the Earth and Plan B Earth) and one individual claimant (Mr Spurrier). They each oppose any expansion of Heathrow. The fifth claim was brought by the promoters of a rival Heathrow scheme, which would double the length of the existing northern runway to allow it to operate as two independent runways ("the ENR Scheme").

The claims were listed for a rolled-up hearing at which the court would consider permission to apply on the primary basis that a claim was arguable; and, if a claim were considered arguable, the court would immediately go on to deal with the substantive claim. The four claims were heard by a Divisional Court comprising Hickinbottom LJ and Holgate J. The fifth claim was heard immediately afterwards by a Divisional Court comprising Hickinbottom LJ, and Holgate and Marcus Smith JJ.

On 1 May 2019, the court handed down two judgments, one dealing with 22 grounds of challenge in the first four claims (set out in Annex A to that judgment); and the second judgment dealing with the five grounds of claim in the fifth claim.

All of the claims were, in the event, dismissed.

BACKGROUND TO THE APPEAL

Whether airport capacity for London and the South East should be increased – and, if so, how – are matters which have engaged political and public debate for decades.

In September 2012, the Government established an independent Airports Commission to examine the scale and timing of any increase in capacity to maintain the UK's status as Europe's most important aviation hub. In its December 2013 Interim Report, the Commission concluded that there was "a clear case for one net additional runway… to come into operation by 2030; and that either Heathrow and Gatwick were credible locations for that runway". It proceeded to consider and consult upon three options: (i) the NWR Scheme, (ii) the ENR Scheme and (iii) a second runway at Gatwick ("the Gatwick 2R Scheme"). In July 2015, the

Commission published its final report, concluding that, with appropriate mitigating measures, the NWR Scheme best met the identified need.

Over the next year, the Secretary of State for Transport conducted further work on (amongst other things) air quality, noise, carbon emissions and impacts on local communities, before announcing in October 2016 that the NWR Scheme was the preferred scheme. He published a draft ANPS to that effect.

Further consultation and work on that draft followed, including consideration by the Transport Select Committee of the House of Commons, the recommendations of which the Government essentially accepted. On 25 June 2018, the House of Commons debated the draft ANPS and approved it by a large, cross-party majority. The following day, the Secretary of State designated the ANPS under section 5(1) of the Planning Act 2008. It is that designation which the five claims have challenged.

THE FUNCTION OF THE COURT IN THESE CASES

It must be emphasised that the court was not concerned with the merits of increasing airport capacity or of satisfying any need by way of a third runway at Heathrow. Those questions involve (i) the collection and analysis of a mass of technical evidence by experts in the relevant fields, and (ii) a high level political assessment of social and economic factors by those who were assigned by Parliament to make such judgments and who were democratically-accountable.

None of the claimants argued before the court that increasing airport capacity was unlawful. The court was solely concerned with whether the Secretary of State's designation of the NWR Scheme, including the process which led to the designation, was flawed by any legal error.

THE PLANNING PROCESS

The ANPS forms a part of an iterative planning process. It sets a framework under which applications can be made for a development consent order ("DCO") – in effect, planning permission – for a third runway at Heathrow. Development cannot proceed without a DCO. Any application for a DCO will be subject to examination by independent inspectors, who will make a recommendation to the Secretary of State on whether or not that application should be granted and if so subject to what conditions and obligations. It is open to parties to contend at the DCO stage that (e.g.) the particular proposed development should not be allowed because of its adverse effects on the environment. Any decision by the Secretary of State to grant a DCO may also be the subject of a legal challenge on the grounds of error of law.

However, the ANPS does constrain the issues for consideration at the DCO stage to an extent, effectively to exclude arguments that the airport capacity is not needed and to restrict consideration of the ENR and Gatwick 2R Schemes as fulfilling it.

REASONS FOR THE JUDGMENT

The full grounds of challenge can be found in the judgments themselves: but the main grounds fell within the following categories: in the first four claims, climate change **[558-660]**, air quality **[220-285]**, surface access **[185-219]**, noise **[464]** and habitats **[286-373]**; and, in the fifth claim, legitimate expectation and anti-competition.

First four claims ([2019] EWHC 1070 (Admin))

Climate change

The claimants argued that the Secretary of State acted unlawfully by not taking into account the Paris Agreement – which seeks to hold the increase in global average temperature to "well below" 2ºC above pre-

industrial levels and to pursue efforts to limit that increase to 1.5ºC **[602]**. In making these arguments, the claimants faced an overarching difficulty which, in the event, they were unable to surmount. The Paris Agreement does not form part of UK law and so, while the UK has ratified it **[576]**, until Parliament decides if and how to incorporate the Paris Agreement target, it has no effect in domestic law **[606]**. The Climate Change Act 2008 currently sets a carbon cap emissions limit. Under section 2, the Secretary of State has the power to amend that domestic law to take into account the Paris Agreement **[567]**. However, the court found that the Secretary of State did not arguably act unlawfully in not taking into account the Paris Agreement; and, in any event, at the DCO stage this issue will be re-visited on the basis of the then up-to-date position **[648]**. The court held that none of the climate change grounds was arguable.

Air quality

The claimants' main grounds were that (i) in concluding that the NWR Scheme could be undertaken without breaching the UK's obligations under the Air Quality Directive, the Secretary of State failed to apply the precautionary principle **[261]**, (ii) the Secretary of State acted irrationally by adopting a policy that was probably undeliverable within those Air Quality Directive **[266]**, and (iii) the Secretary of State relied upon unjustified assumptions about the deliverability of public transport schemes and the effectiveness of Clean Air Zones **[269]**. The court found that none of these grounds was arguable either.

Surface Access

The claimants submitted, first, that the Secretary of State failed properly to take into account new information and analysis relevant to the surface impact of the NWR Scheme in terms of the adverse impacts of the scheme as a result of more people travelling to and from Heathrow by road **[202]**. The court concluded that the Secretary of State had had adequate regard to the matters relied upon **[208]**. Second, it was submitted that the Secretary of State erred in adopting mode share targets (for the proportion of surface journeys that would be made other than by road) that were unrealistic **[210]**. The court concluded that this was not arguably so **[215-219]**.

Noise

In the context of Strategic Environmental Assessment ("SEA") **[374-502]**, the claimants argued that the noise assessment was inadequate because (i) it used incorrect indicative flight paths **[465]**, and (ii) an incorrect decibel level for determining adverse noise impacts. The court rejected those arguments because (i) the Secretary of State had an "enhanced margin of appreciation" and was entitled to reach a judgment on the flight paths which were likely to be used **[475-477] [487]**, and (ii) expert evidence explained why the 54dB rather than 51dB level was used. The Secretary of State's selection of noise parameters was not open to legal challenge **[491]**. The court found two of the grounds arguable but not made good; the others were not arguable,

Habitats

It was submitted that the Secretary of State acted unlawfully in not treating the Gatwick 2R Scheme as an alternative to the NWR Scheme for the purposes of articles 6(3) and 6(4) of the Habitats Directive. This was argued on the basis that (i) the Secretary of State's approach to choosing the objectives of the ANPS was unlawful (namely maintaining the UK's EU aviation 'hub status') and (ii) there was no evidence to form the view that the Gatwick 2R Scheme would cause harm to a Special Area of Conservation upon which a priority species was present. The court allowed permission to proceed on both grounds, but dismissed them on their merits. The court held that it was not unlawful for the Secretary of State to prefer a scheme on the basis that it would maintain the UK's hub status and it was within his discretion to conclude that Gatwick did not fulfil this aim and so was not a true "alternative" **[355]**. On the second sub-ground, whilst the court found that there was not sufficient evidence find that the Gatwick 2R Scheme would cause harm to a Special

Area of Conservation, this was not determinative as Gatwick had already been ruled out on the basis that it did not meet the hub status requirement **[370-371]**.

Fifth claim ([2019] EWHC 1069 (Admin))

The claimants argued that the Secretary of State had wrongly preferred to NWR Scheme promoted by the owner/operators of Heathrow ("HAL") over the ENR Scheme promoted by the claimants. The claimants contended that the reasons for preferring the NWR Scheme over the ENR Scheme as stated in the ANPS were "manifestly bogus", and that the real reason for preferring the NWR Scheme was because the Secretary of State had sought from HAL an assurance or guarantee that if he chose the ENR Scheme HAL would implement it, which HAL had not provided. It was contended that this reason for preferring the NWR Scheme infringed a legitimate expectation in the claimants and also infringed articles 102 and 106(1) TFEU (the Treaty on the Functioning of the European Union). The court rejected these arguments.

The contention that the claimants had a legitimate expectation that the Secretary of State would not take into account, in the decision to prefer the NWR Scheme, the absence of an assurance from HAL that it would build the ENR Scheme if it was preferred failed for three reasons: (i) there was no such legitimate expectation created by the Secretary of State; (ii) had there been a legitimate expectation (which there was not), the Secretary of State was entitled to resile from it; and (iii) in any event, the absence of an assurance or guarantee from HAL regarding the ENR Scheme was not material to the preference decision. This was Ground 2 of the claimants' challenge. Ground 1 – which was a competition law point based on the TFEU, but on similar facts to Ground 2 – failed for similar reasons; although the court also identified further reasons why this ground would fail under EU competition law. In respect of both of these grounds, the court granted permission to apply but found the grounds had not been made good.

The court rejected the argument that the NWR Scheme had been preferred for reasons that were "bogus". It also rejected Grounds 4 and 5 of the claimants' challenge and found that these challenges (relating to two of the three reasons for preferring the NWR Scheme) were unarguable. The claimants' challenge to the third reason in the ANPS for preferring the NWR Scheme was abandoned by the claimants prior to the hearing.

RIGHT OF APPEAL

The Divisional Court refused permission to apply for judicial review on all but six grounds (four of which are from the first four claims habitats and SEA); and two from the fifth claim (legitimate expectation and anti-competition). All the other grounds were not considered not to have been arguable: the claimants may apply for permission to appeal against the Divisional Court's decision concerning those grounds to the Court of Appeal within 7 days. The remaining six grounds were ultimately dismissed. The claimants may apply to the Divisional Court for permission to appeal within 7 days. If the Divisional Court refuses permission to appeal to the Court of Appeal, the claimants may re-apply directly to the Court of Appeal.

References in square brackets are to paragraphs in the main judgment.

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